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December 23, 2009

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BY ELECTRONIC AND FIRST CLASS MAIL

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Club Texting Petition for Declaratory Ruling; CG Docket 02-278

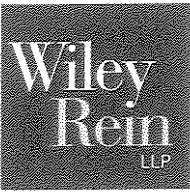
Dear Ms. Dortch:

Club Texting, Inc. ("Club Texting") respectfully submits this letter to the Federal Communications Commission ("FCC" or "Commission") in the aforementioned proceeding. On November 9, 2009, the Commission issued a Public Notice soliciting comments on Club Texting's Petition for Declaratory Ruling ("Petition"), which requested that the Commission clarify that, consistent with the treatment of fax broadcasters, text broadcasters¹ are not "senders" of text messages under § 227(b)(1) of the Telephone Consumer Protection Act, 47 U.S.C. § 227(b)(1) (the "Act" or "TCPA"). Club Texting is filing this letter to support its Petition and respond to several new comments in opposition that were filed leading up to the final deadline for the submission of comments, December 7, 2009.

Several commenters argue that granting the Petition would encourage violations of the TCPA because it would enable senders of unsolicited text messages to obscure their identities and the origin of their messages.² This argument is misdirected: the Petition requests a clarification regarding the respective liability of text message senders and conduit providers and does not implicate the issue of whether or not senders are susceptible to accurate identification. Moreover, responsible conduit providers such as Club Texting collect and maintain identifying information for their clients, including names, email addresses, cell phone numbers, credit card information, and details about all text messages sent. In order to sign up for an account, a client must provide a confirmation number sent to their cell phone by Club Texting. This process verifies the cell phone number the client has provided. And Club Texting does not send text

¹ As defined in the Petition for Declaratory Ruling, a "text broadcaster" is a person or entity that transmits SMS text messages to mobile telephones on behalf of another person or entity for a fee.

² See Comment of Jay Connor; Comments of Robert Biggerstaff at 2-4.



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messages on behalf of a client unless and until that client has purchased account credits using a valid credit card. Every text that is sent via the Club Texting system is logged—the company knows who sent the message, its originating IP address, the associated account information, and the date and time at which the text message was sent. These actions ensure that senders that violate the TCPA can be reliably identified.

Requiring text broadcasters such as Club Texting to include in each text message contact information regarding the sender of the message would not only be technologically infeasible, it would be superfluous and contrary to FCC precedent.³ In most cases, the sender is apparent from the content of the message and the originating short code. Moreover, as described above, text broadcasters like Club Texting already maintain information sufficient to identify the clients that send text messages using their services. Further, requiring text broadcasters to modify their clients' messages to include identifying information would be inconsistent with the Commission's standard for establishing the liability of conduit providers because it would require precisely the kind of substantial involvement that triggers TCPA liability.⁴ Text broadcasters do not develop the content of text messages, they provide a platform for their delivery.

One commenter erroneously suggests that Club Texting encourages violation of the TCPA by including a reference to InfoUSA on its website.⁵ InfoUSA is an independent company that provides direct mail services and maintains its own list of consumers that have opted-in to receive such communications. They even have their own short codes and send out text messages without Club Texting's involvement. Because Club Texting does not maintain or provide lists of consumers that have consented to receive text messages, it refers clients desiring such services to an independent vendor, InfoUSA. Whether this vendor or others like it violate the TCPA is a question wholly separate from that raised by the Petition.

³ *Contra* Comments of Robert Biggerstaff at 9.

⁴ *See, e.g., In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 F.C.C.R. 14014, 14132 (2003); *see also* Petition at 4-8 (explaining the history and conceptual bases of the Commission's regulatory treatment of communications conduit providers).

⁵ *See* Comments of Joe Shields at 1.

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Other commenters directly challenge the Commission's conduit provider liability rule, arguing that it undercuts the purposes of the TCPA and that the Commission should accordingly decline to recognize its application to text broadcasters.⁶ Club Texting respectfully disagrees with these commenters' unsupported assertion that the Commission's rules have encouraged TCPA violations. In any event, these proceedings are not a proper venue for reconsideration of the Commission's longstanding interpretation of the respective liability of senders and conduit providers under the TCPA. Indeed, Congress, in the TCPA, and the Commission, in its regulations implementing the TCPA, have carefully considered the myriad affected interests and have struck an appropriate balance between protecting privacy and ensuring the continued viability of easy and effective methods of communication. The Petition presents a limited request that the Commission clarify that its interpretation of the TCPA giving effect to this careful balance applies with equal force to both fax broadcasters and text broadcasters. This requested clarification is consistent with the Commission's existing rules and determination that senders, rather than conduit providers, are in the best position to ensure that messages are sent only to those who have consented to receive them.⁷

As Club Texting explained in the Petition,⁸ and contrary to the arguments of some commenters, fax broadcasters and text broadcasters provide functionally equivalent services, and the differences between the technological mediums with which they work do not warrant application of differential standards of liability under the TCPA.⁹ The Commission's treatment of communications conduit providers is based upon the nature of the service provided, and not the type of device or technology at issue. The Commission has accordingly adopted a consistent regulatory approach for persons or entities that provide communications conduit services, regardless of whether the service provided extends to telephones, fax machines, or cell phones.¹⁰ Indeed, the Commission need only adhere to its own long-standing precedent in order to clarify that the scope of text broadcaster liability under the TCPA is identical to the liability that extends to other communications conduit providers.

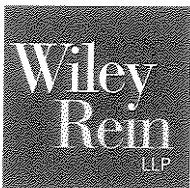
⁶ See Comments of Robert Biggerstaff at 5-8; Comments of Paul D.S. Edwards at 2; Comments of Joe Shields at 2.

⁷ *Contra* Comments of Robert Biggerstaff at 7-8.

⁸ See Petition at 8.

⁹ See Comments of Robert Biggerstaff at 2; Comments of Joe Shields at 1.

¹⁰ *Contra* Comments of Joe Shields at 1.



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Finally, and as Club Texting has previously explained,¹¹ granting the Petition is in the public interest because it is necessary to resolve a growing legal uncertainty that is threatening an emerging—and extremely useful—method of communication. A wide variety of public and social institutions, including state and local governments, schools, and public safety organizations are increasingly discovering that services such as those provided by Club Texting are a cost-effective and efficient way to communicate important and time-sensitive information to their communities. But the lingering uncertainty regarding the respective liability of text broadcasters and their clients for the sending of unsolicited text messages impinges upon the growth and availability of this emerging communications platform. Resolving that uncertainty will both protect this new industry and ensure that the policies underlying the TCPA, as interpreted by the Commission, are properly effectuated.

Sincerely,

A handwritten signature in cursive script, appearing to read "Scott Delacourt".

Scott D. Delacourt

Counsel to Club Texting, Inc.

¹¹ See Petition at 3.